

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SHARYL R. RUSTAD,)	
)	No. CV-11-060-JPH
Plaintiff,)	
)	ORDER GRANTING DEFENDANT'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	
MICHAEL J. ASTRUE, Commissioner)	
of Social Security,)	
)	
Defendant.)	
)	
)	

BEFORE THE COURT are cross-motions for summary judgment noted for hearing without oral argument on July 13, 2012. (ECF No. 13, 19). Attorney Maureen J. Rosette represents plaintiff; Special Assistant United States Attorney M. Thayne Warner represents the Commissioner of Social Security (defendant). The parties have consented to proceed before a magistrate judge. (ECF No. 7). On February 16, 2012, plaintiff filed a reply. (ECF No. 21). After reviewing the administrative record and the briefs filed by the parties, the court **grants** defendant's Motion for Summary Judgment

JURISDICTION

Plaintiff applied for supplemental security income (SSI) on July 15, 2008, alleging disability as of July 5, 2006 (Tr. 21). The applications were denied initially and on reconsideration.

Administrative Law Judge (ALJ) Marie Palachuk held a hearing on September 16, 2009 (Tr. 38-71), and issued an unfavorable decision on October 30, 2009 (Tr. 21-34). The Appeals Council denied review on January 18, 2011 (Tr. 1-5). The ALJ's October 2009 decision became the final decision of the Commissioner, which is appealable to the district court pursuant to 42 U.S.C. §

1 405(g). Plaintiff filed this action for judicial review on
2 February 8, 2011 (ECF No. 1, 4).

3 **STATEMENT OF FACTS**

4 The facts have been presented in the administrative hearing
5 transcript, the ALJ's decision, and the briefs of the parties.
6 They are only briefly summarized here.

7 Plaintiff was born on March 10, 1959 (Tr. 54) and was 50
8 years old on the date of the ALJ's decision. She left school
9 after the eighth grade and has not obtained a GED (Tr. 55). She
10 reported past work as a caregiver, housekeeper, roofer, flagger,
11 forklift operator and waitress (Tr. 55-57). Plaintiff testified
12 that her primary problem is left leg and back pain (Tr. 58-63).
13 The record reflects that plaintiff reported to a medical
14 professional that she was not able to work due to impatience,
15 depression and anxiety (Tr. 264). At the administrative hearing,
16 Plaintiff first stated that she last used illegal substances four
17 or five years prior to the 2009 hearing (Tr. 49). She later
18 agreed that the last time she used methamphetamine was just prior
19 to her scheduled surgery in July 2008 (Tr. 64).

20 **SEQUENTIAL EVALUATION PROCESS**

21 The Social Security Act (the Act) defines disability as the
22 "inability to engage in any substantial gainful activity by reason
23 of any medically determinable physical or mental impairment which
24 can be expected to result in death or which has lasted or can be
25 expected to last for a continuous period of not less than twelve
26 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also
27 provides that a Plaintiff shall be determined to be under a
28 disability only if any impairments are of such severity that a

1 plaintiff is not only unable to do previous work but cannot,
2 considering plaintiff's age, education and work experiences,
3 engage in any other substantial gainful work which exists in the
4 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
5 Thus, the definition of disability consists of both medical and
6 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
7 (9th Cir. 2001).

8 The Commissioner has established a five-step sequential
9 evaluation process for determining whether a person is disabled.
10 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person
11 is engaged in substantial gainful activities. If so, benefits are
12 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If
13 not, the decision maker proceeds to step two, which determines
14 whether plaintiff has a medically severe impairment or combination
15 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),
16 416.920(a)(4)(ii).

17 If plaintiff does not have a severe impairment or combination
18 of impairments, the disability claim is denied. If the impairment
19 is severe, the evaluation proceeds to the third step, which
20 compares plaintiff's impairment with a number of listed
21 impairments acknowledged by the Commissioner to be so severe as to
22 preclude substantial gainful activity. 20 C.F.R. §§
23 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P
24 App. 1. If the impairment meets or equals one of the listed
25 impairments, plaintiff is conclusively presumed to be disabled.
26 If the impairment is not one conclusively presumed to be
27 disabling, the evaluation proceeds to the fourth step, which
28 determines whether the impairment prevents plaintiff from

1 performing work which was performed in the past. If a plaintiff
2 is able to perform previous work, that plaintiff is deemed not
3 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At
4 this step, plaintiff's residual functional capacity (RFC) is
5 considered. If plaintiff cannot perform past relevant work, the
6 fifth and final step in the process determines whether plaintiff
7 is able to perform other work in the national economy in view of
8 plaintiff's residual functional capacity, age, education and past
9 work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
10 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

11 The initial burden of proof rests upon plaintiff to establish
12 a *prima facie* case of entitlement to disability benefits.
13 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
14 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
15 met once plaintiff establishes that a physical or mental
16 impairment prevents the performance of previous work. The burden
17 then shifts, at step five, to the Commissioner to show that (1)
18 plaintiff can perform other substantial gainful activity and (2) a
19 "significant number of jobs exist in the national economy" which
20 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
21 Cir. 1984).

22 STANDARD OF REVIEW

23 Congress has provided a limited scope of judicial review of a
24 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
25 the Commissioner's decision, made through an ALJ, when the
26 determination is not based on legal error and is supported by
27 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995
28 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.

1999). "The [Commissioner's] determination that a plaintiff is not disabled will be upheld if the findings of fact are supported by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n. 10 (9th Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989); *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d 573, 576 (9th Cir. 1988). Substantial evidence "means such evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citations omitted). "[S]uch inferences and conclusions as the [Commissioner] may reasonably draw from the evidence" will also be upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On review, the Court considers the record as a whole, not just the evidence supporting the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

It is the role of the trier of fact, not this Court, to resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational interpretation, the Court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be set aside if the proper legal standards were not applied in weighing the evidence and making the decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1987). Thus, if there is substantial

1 evidence to support the administrative findings, or if there is
2 conflicting evidence that will support a finding of either
3 disability or nondisability, the finding of the Commissioner is
4 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
5 1987).

6 **DAA ANALYSIS**

7 An otherwise disabled individual is not entitled to
8 disability benefits under the Act if drug addiction or alcoholism
9 (DAA) is a contributing factor material to disability. The
10 Contract With America Advancement Act of 1996, Pub. L. No. 104-121
11 § 105(a)9C), amended the definition of disability under the Act to
12 prohibit entitlement to disability benefits under Titles II and
13 XVI for any individual whose disability is based on DAA. Title II
14 of the Act now states: "An individual shall not be considered to
15 be disabled for purposes of this title if alcoholism or drug
16 addiction would (but for this subparagraph) be a contributing
17 factor material to the Commissioner's determination that the
18 individual is disabled." 42 U.S.C. § 423(d)(2)©. Title XVI of
19 the Act contains a similarly worded provision for purposes of
20 determining eligibility for SSI disability benefits. 42 U.S.C. §
21 1382c(a)(30)(J).

22 The Commissioner's disability regulations likewise state, "if
23 we find that you are disabled and have medical evidence of your
24 drug addiction or alcoholism, we must determine whether your drug
25 addiction or alcoholism is a contributing factor material to the
26 determination of disability." 20 C.F.R. § 416.935(a).
27 Specifically, the "key factor" the Commissioner "will examine in
28 determining whether drug addiction or alcoholism is a contributing

1 factor material to the determination of disability is whether we
2 would still find you disabled if you stopped using drugs or
3 alcohol." 20 C.F.R. § 416.935(b). "If we determine that your
4 remaining limitations would not be disabling, we will find that
5 your drug addiction or alcoholism is a contributing factor
6 material to the determination of disability." *Id.*

7 If the ALJ finds the claimant disabled and there is medical
8 evidence of DAA, the ALJ must determine the materiality of the
9 claimant's DAA to her disability. The ALJ must perform the
10 sequential evaluation process a second time, separating out the
11 impact of the claimant's DAA, to determine if she would still be
12 found disabled if she stopped using drugs or alcohol. *Bustamante*
13 *v. Massanari*, 262 F.3d 949, 955 (9th Cir. 2001). The claimant
14 bears the burden of proving that DAA is not a contributing factor
15 material to her disability. *Parra v. Astrue*, 481 F.3d 742, 744-
16 745, 748 (9th Cir. 2007).

17 **ALJ'S FINDINGS**

18 At step one, the ALJ found plaintiff has not engaged in
19 substantial gainful activity since July 15, 2008, the application
20 date (Tr. 23). At step two, she found plaintiff had severe
21 impairments of "T12-L1 mass, degenerative disc disease, reactive
22 airway disease, major depressive disorder, anxiety disorder, not
23 otherwise specified, schizoid personality disorder, and
24 methamphetamine abuse" (Tr. 23). At step three, the ALJ found
25 plaintiff's impairments, alone and in combination, did not meet or
26 medically equal one of the listed impairments in 20 C.F.R.,
27 Appendix 1, Subpart P, Regulations No. 4 (Tr. 27).

28 ///

1 The ALJ then assessed plaintiff's RFC including consideration
2 of plaintiff's substance use disorder (Tr. 29). The ALJ
3 determined that plaintiff could perform light work; could
4 occasionally engage in stooping, climbing, crouching, and
5 crawling; should avoid air pollutants, and could perform routine
6 and repetitive tasks (Tr. 29). The ALJ further found that she
7 would have several non-exertional moderate limitations as well as
8 marked limitations in her ability to perform activities within a
9 schedule, maintain regular attendance, and be punctual within
10 customary tolerances; work in coordination or proximity to others
11 without being distracted by them; complete a normal workday and
12 workweek without interruptions from psychologically based
13 symptoms; and perform at a consistent pace without an unreasonable
14 number and length of rest periods (Tr. 29). The ALJ found that
15 plaintiff had no past relevant work (Tr. 29). At step five, the
16 ALJ found that, with the inclusion of the effects of plaintiff's
17 substance use disorder, there are no jobs in the national economy
18 that plaintiff can perform (Tr. 30). However, the ALJ then made
19 the finding that, if plaintiff stopped using drugs, she would have
20 the RFC to perform light work; could occasionally engage in
21 stooping, climbing, crouching and crawling; should avoid air
22 pollutants; is capable of performing routine and repetitive tasks;
23 is capable of routine changes in the work environment; and is
24 limited to occasional or superficial contact with the general
25 public or with coworkers (Tr. 31). The ALJ concluded that, if
26 plaintiff stopped substance use, considering her age, education,
27 work experience and RFC, and based on vocational expert testimony,
28 there are jobs that exist in significant numbers in the national

1 economy that she can perform (Tr. 33). The ALJ determined that
2 because plaintiff would not be disabled if she stopped the
3 substance use, plaintiff's substance use disorder is a
4 contributing factor material to the determination of disability,
5 and; therefore, plaintiff has not been disabled within the meaning
6 of the Social Security Act at any time from the date the
7 application was filed through the date of her decision (Tr. 33).
8 The ALJ found that plaintiff was not disabled under Section
9 1614(a)(3)(A) of the Act (Tr. 34).

10 ISSUES

11 Plaintiff alleges the ALJ erred because the substantial
12 weight of the record evidence supports a more limited mental RFC
13 determination. (ECF No. 14 at 8-11). Plaintiff specifically
14 argues that the ALJ failed to properly reject the opinions of
15 certain medical sources when determining her mental RFC. *Id.*
16 Plaintiff also contends the ALJ erred because she is more limited
17 from a physical standpoint than as assessed by the ALJ in this
18 case. (ECF No. 14 at 11-13).

19 Defendant asserts the ALJ's psychological evaluation,
20 including her evaluation of plaintiff's methamphetamine abuse, was
21 supported by substantial evidence (ECF No. 20 at 8-13) and the
22 ALJ's assessment of plaintiff's physical limitations was supported
23 by substantial evidence (ECF No. 20 at 14-17).

24 DISCUSSION

25 A. Mental Limitations

26 The ALJ concluded that if plaintiff stopped her substance
27 abuse, she would be able to perform a limited range of light
28 exertion level work with the following non-exertional limitations:

1 she should avoid air pollutants, she is capable of performing
2 routine and repetitive tasks, she is capable of routine changes in
3 the work environment, and she is limited to occasional or
4 superficial contact with the general public or with coworkers (Tr.
5 31). The non-exertional limitations assessed by the ALJ are
6 supported by the opinions of reviewing medical consultants, Drs.
7 Gentile and Kraft, who were cognizant of documented recent
8 methamphetamine use by plaintiff.

9 On August 12, 2008, Mary A. Gentile, Ph.D., reviewed the
10 record and completed a Mental Residual Functional Capacity
11 Assessment form (Tr. 294-296). Dr. Gentile determined plaintiff
12 was either not significantly limited or moderately limited in all
13 areas of mental functioning (Tr. 294-295). She concluded
14 plaintiff was able to understand, remember and carry out simple,
15 routine tasks; would occasionally have slowed concentration due to
16 her symptoms or methamphetamine use; would work best away from the
17 general public; would be able to have superficial contact with co-
18 workers; would need extra time to adapt to change; and would be
19 able to travel, avoid hazards and set goals (Tr. 296). Dr.
20 Gentile noted plaintiff had not been truthful regarding her
21 methamphetamine use and that her anxiety may be a manifestation of
22 chronic methamphetamine use (Tr. 310). On November 12, 2008,
23 Patricia Kraft, Ph.D., affirmed Dr. Gentile's assessment (Tr.
24 320).

25 Plaintiff argues that limitations assessed by Amy Robinson,
26 M.S., under the supervision of W. Scott Mabee, Ph.D., and medical
27 expert Stephen Rubin, Ph.D., reflect greater restrictions from a
28 psychological standpoint than assessed by the ALJ and the ALJ

1 erred by not according these medical professionals greater weight.
2 (ECF No. 14 at 8-11).

3 Ms. Robinson, under the supervision of Dr. Mabee, examined
4 plaintiff on April 14, 2008, as part of plaintiff's application
5 for Washington state social services benefits (Tr. 260-270). Ms.
6 Robinson diagnosed Major Depressive Disorder, Single Episode,
7 Severe without Psychotic Features; Anxiety Disorder, NOS; and
8 Schizoid Features (Tr. 267). Plaintiff was given a GAF score of
9 45-50¹ (Tr. 267). Ms. Robinson additionally filled out a
10 Psychological/Psychiatric Evaluation form and checked boxes
11 indicating that plaintiff had marked limitations in her abilities
12 to exercise judgment and make decisions, relate appropriately to
13 co-workers and supervisors, interact appropriately in public
14 contacts, respond appropriately to and tolerate the pressures and
15 expectations of a normal work setting, and control physical or
16 motor movements and maintain appropriate behavior (Tr. 262).
17 Significantly, plaintiff reported to Ms. Robinson that she last
18 used methamphetamine three years prior to the April 2008
19 evaluation (Tr. 266).

20 The ALJ did not reject Ms. Robinson's opinions, but rather
21 placed them in the context of the record as a whole. While
22 plaintiff reported to Ms. Robinson that she last used
23 methamphetamine three years prior to the April 2008 evaluation
24

25 ¹A GAF of 50-41 reflects: "[s]erious symptoms (e.g.,
26 suicidal ideation, severe obsessive rituals, frequent
27 shoplifting) or any serious impairment in social, occupational,
28 or school functioning (e.g., no friends, unable to keep a job)."
DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS-IV 32 (4th ed.
1994).

1 (Tr. 266), it is clear from the record that plaintiff was using
2 methamphetamine at the time of Ms. Robinson's examination (Tr.
3 282).² It is thus apparent that the limitations assessed by Ms.
4 Robinson reflect plaintiff's condition while she was using drugs.
5 The ALJ's RFC assessment which considered plaintiff's substance
6 use included several non-exertional limitations consistent with
7 the opinions of Ms. Robinson (Tr. 29).³

8 The same is true with respect to the limitations assessed by
9 Dr. Rubin. Dr. Rubin testified as a medical expert at the
10 administrative hearing held on September 16, 2009 (Tr. 43-53). He
11 indicated that there were past concerns with drug use, but he did
12 not see evidence of current drug use with a recent psychological
13 evaluation⁴ (Tr. 45). At the September 2009 administrative
14 hearing, Dr. Rubin asked plaintiff when she last used illegal
15 substances (Tr. 49). Plaintiff reported it had been four or five
16 years since she last used methamphetamine (Tr. 49). However, the
17 ALJ then indicated that the record reflected plaintiff had used

18
19 ²On July 22, 2008, plaintiff admitted to David Gruber, M.D.,
20 that she had used methamphetamine the previous night and had
been using the substance for more than six months (Tr. 282).

21 ³The ALJ determined that, with the inclusion of plaintiff's
22 substance abuse disorder, she would have several non-exertional
23 moderate limitations as well as marked limitations in her ability
24 to perform activities within a schedule, maintain regular
25 attendance, and be punctual within customary tolerances; work in
26 coordination or proximity to others without being distracted by
them; complete a normal workday and workweek without
27 interruptions from psychologically based symptoms; and perform
at a consistent pace without an unreasonable number and length
28 of rest periods (Tr. 29).

⁴The psychological evaluation Dr. Rubin refers to is that of
Ms. Robinson.

1 methamphetamine as recently as July 2008 (Tr. 49). Dr. Rubin
2 stated that, based on this information, "it leaves open the
3 question . . . whether or not there is a substance addiction
4 disorder." (Tr. 49-50).

5 Dr. Rubin opined that plaintiff would have a mild restriction
6 of daily living, a moderate difficulty in maintaining social
7 functioning, at least a moderate difficulty in concentration,
8 persistence and pace and no episodes of decompensation (Tr. 50).
9 Dr. Rubin testified that plaintiff had marked limitations in her
10 abilities to perform activities within a schedule and maintain
11 regular attendance, work in coordination and in proximity with
12 others without being distracted, and complete a normal workday and
13 work week without interruption from psychologically based symptoms
14 (Tr. 51). Dr. Rubin testified that his assessment was based on
15 psychological issues and not drug-related issues (Tr. 52).

16 Dr. Rubin never examined or treated plaintiff (Tr. 44). He
17 merely reviewed the record and based his opinions on the
18 information he discerned therefrom. Not only was Dr. Rubin
19 mislead by plaintiff's statement at the administrative hearing
20 that she had not used methamphetamine for four or five years (Tr.
21 49), but also by his reliance on Ms. Robinson's report (Tr. 45)
22 which indicated plaintiff last used methamphetamine three years
23 prior to her April 2008 evaluation (Tr. 266). As indicated above,
24 the record reflects that Plaintiff used methamphetamine in July
25 2008 and that she had been using for more than six months prior to
26 that time (Tr. 282). Dr. Rubin's assessment was based on
27 psychological issues and not drug-related issues (Tr. 52),
28 because, as he stated, although there were past concerns with drug

1 use, he discovered no evidence of current drug use in his review
2 (Tr. 45). The undersigned finds that, like Ms. Robinson, Dr.
3 Rubin based his opinions on the mistaken belief that plaintiff had
4 not used methamphetamine for years. Consequently, it was
5 reasonable for the ALJ to find that Dr. Rubin's assessment failed
6 to account for plaintiff's methamphetamine use (Tr. 29).

7 The substantial weight of the record evidence supports the
8 ALJ's mental RFC determination which reflects plaintiff's
9 functioning while using methamphetamine (Tr. 29) as well as if she
10 stopped using the substance (Tr. 31). Accordingly, the ALJ did
11 not err in this regard.

12 **B. Physical Limitations**

13 Plaintiff also asserts the ALJ erred by finding she has the
14 RFC to perform light exertion level work activities. (ECF No. 14
15 at 11-13). Plaintiff contends that the opinions of Drs. Shanks
16 and Gruber reflect that she has greater restrictions from a
17 physical standpoint than those assessed by the ALJ. *Id.*

18 William M. Shanks, M.D., examined plaintiff on May 20, 2008
19 (Tr. 248-250). Earlier x-rays showed evidence of degenerative
20 disc changes at the L4-5 and LS levels, and a recent MRI showed
21 evidence of a tumor extending from T12 to the L1 level (Tr. 250).
22 Dr. Shanks diagnosed degenerative disc disease and nerve root
23 irritations. He contacted neurosurgeon David P. Gruber, M.D., for
24 further direction and stated that plaintiff "would not be capable
25 of work until the exact nature of her condition is known." *Id.*

26 Dr. Gruber examined plaintiff on June 30, 2008 (Tr. 290-293).
27 Plaintiff reported to Dr. Gruber that on average her pain is an 8
28 or 9 on a pain scale from 0 to 10 (Tr. 290). Nevertheless,

1 plaintiff indicated she was able to participate in the majority of
2 her day-to-day activities without difficulty (Tr. 290). Dr.
3 Gruber noted that while plaintiff appeared somewhat uncomfortable,
4 she was in no acute distress (Tr. 292). His examination did not
5 reveal significant limitations (Tr. 292), and he did not
6 specifically restrict plaintiff's activities.

7 Plaintiff followed up with Dr. Gruber on July 9, 2008 (Tr.
8 284-285). Dr. Gruber recommended surgery; however, on the day of
9 the scheduled surgery, July 22, 2008, plaintiff admitted to using
10 methamphetamine the previous night and indicated she had been
11 using for more than six months (Tr. 282). The surgery was
12 cancelled and plaintiff was discharged as a patient. *Id.*

13 On August 12, 2008, Gloria Marshall, a disability
14 determination examiner, completed a physical residual functional
15 capacity assessment (Tr. 312-319). Ms. Marshall opined that
16 plaintiff could perform light exertion level work⁵ with some
17 postural and environmental limitations (Tr. 313-316). Ms.
18 Marshall noted that plaintiff's credibility was reduced due to her
19 history of methamphetamine use and the denial of such use (Tr.
20 317). She commented that Dr. Shanks opinion was not given
21 controlling weight because it was given for GAU purposes⁶ and was
22 not fully supported by the record evidence (Tr. 318).

24 ⁵Light level work involves lifting no more than 20 pounds
25 at a time with frequent lifting or carrying of objects weighting
up to 10 pounds. 20 C.F.R. §§ 404.1567(b), 416.967(b).

26 ⁶When a physician is involved in the application process,
27 thus becoming an advocate for the claimant, an ALJ is entitled
28 to consider this factor in evaluating his testimony. *Crane v.*
Shalala, 76 F.3d 251, 254 (9th Cir. 1996).

1 On November 18, 2008, Alfred Scottolini, M.D., affirmed the
2 residual functional capacity assessment completed by Ms. Marshall
3 on August 12, 2008, finding it was "substantially and
4 tech[nically] correct" (Tr. 321). Dr. Scottolini noted that
5 plaintiff's spinal tumor was "obviously benign and very likely a
6 neurofibroma"⁷ (Tr. 321).

7 Contrary to plaintiff's argument, the ALJ did not rely on the
8 opinion of a non-doctor (Ms. Marshall). The ALJ based her
9 physical RFC determination on Dr. Scottolini's opinion (Tr. 32),
10 which incorporates Ms. Marshall's assessment by reference (Tr.
11 321). The ALJ did not err by relying on Dr. Scottolini's opinion
12 in this regard.

13 With respect to Dr. Shanks' indication that plaintiff was
14 severely limited and "would not be capable of work until the exact
15 nature of her condition is known," this is not a statement that
16 plaintiff would be continuously limited in this manner for 12
17 consecutive months, see 42 U.S.C. § 1382c(a)(3)(A), just that she
18 should not work temporarily (until the condition was more
19 thoroughly investigated). Dr. Shanks referred plaintiff to Dr.
20 Gruber who did not find significant work-related limitations on
21 exam (Tr. 32, 292). His examination was significant only for mild
22 spasm and somewhat slow and antalgic gait, with "diffusely muted"
23 sensation in the left lower extremity, and "slight, generalized
24 decrease in strength in the left lower extremity" (Tr. 32, 292).

26 ⁷Neurofibromas are benign tumors consisting of Schwann
27 cells and neural fibroblasts. THE MERCK MANUAL 2377 (18th ed.
28 2006). Treatment consists of surgical removal or irradiation.
Id. at 2378-2379.

1 Therefore, as indicated by the ALJ, Dr. Shanks' opinion that
2 plaintiff was severely limited is inconsistent with the reports of
3 Dr. Gruber.

4 Plaintiff's contention that the ALJ failed to accord weight
5 to Dr. Gruber's indication that plaintiff's average pain is an 8
6 or 9 on a pain scale from 0 to 10 (Tr. 290) also lacks merit.
7 Plaintiff reported this level of pain to Dr. Gruber. Subjective
8 complaints to a doctor are not medical opinions from that doctor.
9 Moreover, the ALJ found that plaintiff's subjective complaints
10 regarding the extent of her functional limitations were not fully
11 credible in this case (Tr. 31), and plaintiff does not contest
12 this determination. A physician's opinion may be disregarded when
13 it is premised on the properly rejected subjective complaints of a
14 plaintiff. *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir.
15 2001). This reported level of pain is further inconsistent with
16 plaintiff's report to Dr. Gruber that she was able to participate
17 in the majority of her day-to-day activities without difficulty
18 (Tr. 290).

19 Based on the foregoing, the undersigned finds that the ALJ's
20 physical RFC determination is in accord with the weight of the
21 record evidence. The record does not support a more restrictive
22 finding than Plaintiff being restricted to work at the light
23 exertion level. Accordingly, the ALJ did not err in so finding in
24 this case.

25 CONCLUSION

26 Having reviewed the record and the ALJ's conclusions, this
27 court finds that the ALJ's decision is free of legal error and
28 supported by substantial evidence. Accordingly,

1. Defendant's Motion for Summary Judgment (**ECF No. 19**) is **GRANTED.**

2. Plaintiff's Motion for Summary Judgment (**ECF No. 13**) is **DENIED.**

IT IS SO ORDERED. The District Court Executive is directed to file this Order, provide copies to the parties, enter judgment in favor of Defendant, and **CLOSE** this file.

DATED this 1st day of August, 2012

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT - 18